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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL RAMIREZ,

Defendant and Appellant.

2d Crim. No. B215748
(Super. Ct. No. 2007004440)
(Ventura County)

Daniel Ramirez appeals his conviction for voluntary manslaughter (Pen. Code, § 192, subd. (a)),¹ a lesser included offense of the charged crime of murder (§ 187, subd. (a)). The jury found true an allegation that appellant personally used a firearm. (§ 12022.5, subd. (a).) The trial court sentenced appellant to 21 years in state prison consisting of an upper term of 11 years for the voluntary manslaughter conviction and an upper term of 10 years for the firearm enhancement.

Appellant contends (1) that the court abused its discretion when it excluded testimony of a gang expert and other witnesses that appellant offered to prove the victim's bad character and (2) that his sentence reflects unlawful dual use of the fact that he used a firearm. We affirm.

¹ All statutory references are to the Penal Code unless otherwise stated.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant and his victim, Mike Velasquez, were neighbors.

Appellant resented the gang and drug activities in and around the condominium where Velasquez lived. The two men did not like each other.

On December 9, 2006, Velasquez overheard appellant refer to Velasquez and his visitors as "tweakers." Velasquez came out of his condominium, unarmed, and confronted appellant. A neighbor watched the men stand face to face, yelling at each other. Velasquez was under the influence of high levels of methamphetamine. He was 6 or 7 inches taller than appellant and weighed 295 pounds. According to the neighbor, Velasquez had his hands at his sides and never attacked appellant. According to appellant and his friend, Velasquez was "in an aggressive posture."

Velasquez called appellant a "pussy." Appellant shot Velasquez in the face just to the left of his nose and said, "Who's the pussy now, punk?" or, "I'm not a fuckin' pussy." Appellant fired the gun 2 to 12 inches away from Velasquez' head. The gun shot killed Velasquez.

Appellant ran away, threw the gun in the ocean, but then turned himself in to the police. While on the run, he called his friend and said, "You knew I was for real, dog." Appellant went on to say, "It's unfortunate, you know, we talk about this, and unfortunately I'm the one that had to do something about it." He told his friend that he had messed up and said, "[D]on't tell [the police] shit, dog. They don't know shit." When he turned himself in, appellant told a police officer that he had been afraid because of all the gang and drug activity in the area, and that he saw Velasquez reach behind his back before he shot Velasquez.

Appellant was charged with murder (§ 187, subd. (a)) and it was alleged that he personally and intentionally discharged a firearm causing great

bodily injury (§ 12022.53, subds. (a)(1), (b)-(e)(1)).² He claimed self defense and testified on his own behalf.

Appellant testified that at about 2:00 a.m., he and his friend parked in the complex where his friend and Velasquez both lived. Appellant carried a gun in a holster under his left armpit. He had racked a bullet in it so it was ready to fire. He told his friend to lock the truck because there were "tweakers" around. Velasquez shouted down to him and they yelled back and forth. Velasquez came downstairs and confronted appellant in a fighting stance. Appellant was scared. He reached for the gun in its holster and told Velasquez he did not want any problems. Velasquez reached behind his back and appellant shot him. He agreed that Velasquez had never laid a hand on him, and he had never seen Velasquez with a weapon.

Appellant testified that Velasquez associated with members of the Colonia Chiques gang, and that it is a violent and dangerous gang. He said gang members frequented Velasquez' condominium. Appellant said that, in the past, he had many encounters with the Colonia Chiques gang. Appellant had been stabbed, hit with a baseball bat, beaten and harassed by its members. One week before he shot Velasquez, appellant's cousin had been harassed by Velasquez and others, and appellant had confronted them. Appellant acknowledged that he has "Chiques" tattoos on his body, but he said, "Chiques" just means "Oxnard."

Appellant testified that Velasquez regularly beat his girlfriend, had beaten up a neighbor, received visitors who had weapons and drugs, had been beaten up while "debt collecting," and had been beaten up for stealing from a drug dealer. Appellant had heard that Velasquez sold guns.

² The indictment included subdivision (e)(1) in the section 12022.53 allegation, but the prosecution did not seek to prove that the killing was committed on behalf of a criminal street gang, and the jury was not instructed pursuant to subdivision (e)(1).

Appellant also presented the testimony of several witnesses to prove Velasquez' dangerous character. A toxicologist testified that Velasquez was a chronic user of methamphetamine, and at the time of his death, his blood contained a toxic level of methamphetamine. He said chronic use increases aggravation and confusion. Velasquez' prior girlfriend, Cynthia Beaumont, testified that Velasquez beat her. Velasquez' former roommate, Christa Gross, testified that Velasquez threatened to cut the throat of a man during a fight, he threatened people who owed his girlfriend money and he regularly used drugs. Appellant's cousin testified to the incident one week before the shooting in which Velasquez had harassed him.

The court denied appellant's request to present additional character witnesses against Velasquez. Two police officers would have testified that they detained Velasquez 10 days before the stabbing while he was under the influence of methamphetamine, in the company of a girlfriend who had methamphetamine, a scale, and pay/owe sheets in her purse. Jennifer O'Donnell would have testified that one night Velasquez entered her hotel room, shone a flashlight in her eyes, and took money from her purse to collect a drug debt. Debra Keller would have testified that Velasquez had once tried to intimidate her with threats.

The court also denied appellant's request to present a gang expert. The gang expert would have offered his opinion that Velasquez was a gang member, based on his tattoos. He would also have described the activities of the Colonia Chiques gang.

The court excluded the evidence pursuant to section 352. It concluded that the gang link in the case was not sufficient to require gang expert testimony, that its introduction would likely confuse the jurors, that the jury had heard more than enough about Colonia Chiques, and that the evidence had already strayed "far afield."

The jury acquitted appellant of murder and found him guilty of the lesser included offense of voluntary manslaughter. The jury found true the

allegation that appellant personally and intentionally used a firearm causing great bodily injury and death. (§ 12022.5, subd. (a).)

The court sentenced appellant to the upper terms for both the crime and the enhancement because appellant had an extensive criminal history and because he used a gun. The court explained, "I find it troubling the fact that a firearm was carried. . . . [¶] Because of that and because of his past history the Court does elect to sentence the defendant to the high term of 11 years. Because of his past history and his past felony conviction involved a firearm and this one again does the Court will also add the additional and consecutive sentence of 10 years pursuant to 12022.5(a)"

DISCUSSION

Cumulative Evidence of Victim's Character

We reject appellant's contention that the court abused its discretion when it excluded expert testimony about the Colonia Chiques street gang and the testimony of police and lay witnesses to establish Velasquez' propensity to use and deal methamphetamine and to threaten violence.

A trial court has discretion to exclude relevant evidence when its probative value is substantially outweighed by the risk of undue influence, confusion or undue consumption of time. (Evid. Code, § 352.) We review a court's exclusion of evidence for abuse of discretion and will not disturb it unless it exceeds the bounds of reason. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

The court did not abuse its discretion when it excluded the proffered evidence. The gang evidence had only tenuous relevance to the issues in dispute, and the evidence of threatening behavior and drug involvement were cumulative to evidence previously presented. The jury was not required in this case to determine whether any party was a gang member or had acted for the benefit of a street gang. The jury did have to determine whether appellant's fear of Velasquez was reasonable, and the proffered evidence had some tendency in reason to prove that it was. (§ 198.) But the proffered evidence was cumulative. The prosecution

and defense witnesses had nearly exhausted the topics of Velasquez' involvement with gang members and drug dealers, his use of methamphetamine, and his past violent behavior. Appellant was given wide latitude to testify on these topics. The prosecution's witnesses had already testified that Velasquez' girlfriend was a drug dealer and that he beat her; that he was a debt collector; that drugs were used in, and dealt from, the condominium where he lived; that gang members associated with that address; and that the neighbors were disturbed by the people who used drugs there and fought outside. They testified that Velasquez was regularly under the influence of methamphetamine, that he was a very big man and that he was irrational and erratic. They testified that he had broken into a car to take drugs and that he spoke of his gun. Photographs of Velasquez' tattoos were in evidence. The court told defense counsel that if he had a witness who could testify that Velasquez was a known gang member, then gang expert testimony would be permitted. Otherwise it would only confuse the jurors. We agree. The trial court had discretion to exclude the proffered evidence.

Aggravating Sentencing Factors

Appellant contends that the court unlawfully aggravated the term for the base term and the term for the enhancement based on the same fact. We disagree.

The court relied on two facts to impose the upper terms: appellant's criminal history and appellant's use of a firearm. The probation report supported the court's finding that appellant had an extensive criminal history, including a prior felony that involved a firearm. The court stated that it was imposing the upper terms based on appellant's criminal history and his use of a firearm in the present case. There was no dual use of facts.

Moreover, a trial court may use a single fact, such as recidivism, to aggravate both a base term and an attendant enhancement. (*People v. Moberly* (2009) 176 Cal.App.4th 1191, 1198.) The statement to the contrary in *People v.*

Velasquez (2007) 152 Cal.App.4th 1503, 1516, fn. 12), upon which appellant relies, is dicta as explained in *Moberly*. (*Moberly*, at p. 1198.)

DISPOSITION

The judgment is affirmed.

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COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Edward F. Brodie, Judge
Superior Court County of Ventura

Gerald Peters, under appointment by the court of appeal, for
Defendant and Appellant.

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